

SHERIFFDOM OF GLASGOW & STRATHKELVIN

PRACTICE NOTE NO 1, 2012

FAMILY AND CIVIL PARTNERSHIP ACTIONS

GUIDANCE FOR SHERIFFS AND PRACTITIONERS

Purpose

1. The purpose of this Practice Note is to secure the efficient management of procedure in Family and Civil Partnership Actions. It should be read subject to the detailed rules of procedure to be found in Chapter 33 of the Ordinary Cause Rules 1993. It will be revised in light of experience and any new primary or secondary legislation.

Commencement

2. This Practice Note applies to all applications lodged or proceedings commenced, on or after 1 March 2012.

PART I

Definition of family actions (OCR 33.1)

3. The definition of a family action does not include applications under Sections 28 and 29 of the Family Law (Scotland) Act 2006 in respect of financial provision for former cohabitants nor does it include interdict actions between spouses/civil partners and former cohabitants/partners. Agents should not submit such actions to the family section for warranting unless the action includes a crave or craves for orders under Sections 1, 2 or 11 of the Children (Scotland) Act 1995.
4. All applications under the Matrimonial Homes (Family Protection) (Scotland) Act 1981 Act fall within the definition of family actions including applications under Section 2(3) of the said 1981 Act. Agents should send all such applications to the family section for warranting.

PART II

DESIGNATIONS OF PARTIES IN INITIAL WRITS

Non-disclosure of address

5. If agents consider it is appropriate not to disclose the address of a party, they must aver fully why the address is not being disclosed. It is insufficient simply to aver that the party seeking to withhold their address does not wish the other party to know her/his whereabouts. In those circumstances the party is not properly designed and the Initial Writ is not in proper form and will not be accepted by the court.
6. The party seeking to withhold her/his address must adduce reasons in support of that position which satisfy the court and allow it to exercise its discretion in favour of the party seeking non-disclosure of her/his address.
7. If there are no averments to support the non-disclosure of a party's address the Initial Writ is not in proper form and should not be warranted. If the writ is warranted in error the action will not be allowed to proceed until the rules of procedure have been complied with.
8. Agents are required to justify a party's attempt to withhold her/his address at any stage of the proceedings particularly if the averments upon which they seek to found are of some age or are vague or have been diluted in some way, for example, during amendment procedure.

(*A.W.B. v J.P.* www.scotcourts.gov.uk/opinions/F99_07.html reported as *B v P* 2010 GWD 19-371. See also *Murdoch v Young* 1909 2 S.L.T. 450; *Stein v Stein* 1936 S.C. 268; *McCull v McCull* 1949 S.L.T. (Notes) 11; and *Doughton v Doughton* 1958 SLT (notes) 34.)

PART III

Certificates of citation in family and civil partnership actions

9. The increasing incidence of certificates of citation which are being lodged in improper form is creating an unnecessary additional administrative burden. Many agents are routinely omitting reference in their certificates of citation to the notices which have been served on the defender along with the service copy Initial Writ. Such certificates will be returned by the Sheriff Clerk's office for clarification as to whether the appropriate notices have been served on the defender.

10. The certificate of citation must be in form F16 or form CP17 (as appropriate) and must state which notice(s) was/were attached to the service copy Initial Writ when service was effected on the defender. If the necessary notices have been served on the defender then amendment of the certificate by agents may be sufficient. However, if no reference is made in the certificate of citation to service of the required notices on the defender, the sheriff may order re-service of the action to ensure the necessary notices are served.

(OCR 33.11 - 33.14 and OCR 33A.11 - 33A.14)

PART IV

AFFIDAVITS IN FAMILY AND CIVIL PARTNERSHIP ACTIONS

[Part IV (paragraphs 11 – 31) has been repealed and replaced by Practice Note No. 3 of 2018, Affidavits in Family and Civil Partnership Actions]

PART V

Section 11 reports – appointment of solicitor reporters

32. The sheriff clerk will retain a register of solicitors willing to prepare Section 11 reports in family cases. The sheriff clerk will retain a note of the contact details of such solicitors. Each solicitor on the register must provide the sheriff clerk with written confirmation of any changes to those contact details. In the event of the

contact details changing and the sheriff clerk not being advised in writing, the solicitor's name may be deleted from the register.

33. From time to time, to ensure that the said register contains a sufficient number of solicitors to meet operational requirements, the sheriff clerk may invite applications from suitably qualified solicitors to be considered for inclusion on the said register. Applications submitted outwith the period specified by the sheriff clerk for submission of such applications will not be considered.
34. In **every** case where the sheriff orders such a report (whether the sheriff orders an initial or supplementary report) reporters must obtain information from the Data Protection Office of Strathclyde Police regarding the previous convictions of the parties to the action. In some cases it will be appropriate to obtain details of any previous convictions of their respective partners or indeed any other adults with whom they are living or who will have a potential involvement in the care of the child(ren) concerned. Reporters must request this information from Strathclyde Police at the earliest possible opportunity after receiving instructions.
35. Any response from Strathclyde Police must be appended to the report. Even if there are no previous convictions, or there are no convictions which the reporter considers relevant to the issues before the court, the reply from Strathclyde Police must be annexed to the report. Any information provided by Strathclyde Police which is not in written form should normally be included in the report unless, exceptionally, Strathclyde Police provide information to the reporter on a confidential basis on condition that it is not disclosed to the parties in which case the information should be contained in a separate confidential report to the sheriff.
36. In the event of the reporter having received no response from Strathclyde Police prior to completion of the report, the reporter should, when submitting the report, advise the court of the up-to-date position, providing a brief summary of the position (such as the outcome of any chase up enquiries) and confirming that the

Strathclyde Police response will follow. The police response must be forwarded to the court immediately upon receipt.

PART VI

Citation of Section 11 reporters as witnesses in family proofs

37. The reporter is the court's reporter and is in a different position to that of witnesses of fact and expert witnesses instructed by the parties. No reporter should be cited as a witness by any party to an action without an application having first been made to the court for authority to have the reporter appear before the court for examination on oath regarding any matter dealt with in the report.

(Section 11(4) of the Matrimonial Proceedings (Children) Act 1958. See also *Kristiansen v Kristiansen* 1987 SCLR 462 and *Oliver v Oliver* 1988 SCLR 285.)

PART VII

Allocation of child welfare hearings

38. Agents seeking an urgent child welfare hearing must set out in full the reasons for seeking such a hearing to enable the sheriff properly to consider the request.
39. In the event that agents consider that a child welfare hearing should be fixed at the time of warranting an initial writ they must set out in full the reasons for seeking such a hearing to enable the sheriff properly to consider the request.
40. Agents must append to any motion seeking the allocation of a child welfare hearing a note of the reasons for fixing such a hearing to enable the sheriff to give proper consideration to the motion whether or not the motion is opposed or joint.

PART VIII

Motions

41. Where a motion to allow a part of process to be received late or to fix a child welfare hearing is made, either orally or in writing, the reason for the lateness or need for child welfare hearing shall be stated by the party making the motion, and that reason shall be recorded in the interlocutor.

PART IX

Undefended family actions – application of the year and a day rule

42. The year and a day period is calculated from the end of the period of notice.
43. If no minute for decree has been received during said period (and there has been no other procedure during that period and no judicial step has been taken during that period) then the action falls and the sheriff has no power to make any further order. Any interim orders previously granted have also fallen after the expiry of said period.
44. If a minute for decree has been received during said period but decree cannot be granted for some reason, the intervention of the court has been invoked and the court's response has been that the minute has been refused, the submission of the minute will be treated as a judicial step in the process which interrupts the running of the said period. The action will not therefore fall after a year and a day in these circumstances.

(See *inter alia* *Cringean v McNeil* 1996 SLT (Sh Ct) 136 and the decision of Sheriff Principal Macleod in *The Royal Bank of Scotland plc v Mason* 1995 SLT (Sh Ct) 32.)

PART X

Minutes in family and civil partnership actions

45. In depending cases, upon receipt of a minute averring contempt of court the sheriff will issue an interlocutor providing for service on the alleged contemnor and the fixing of a procedural hearing.

46. Where the original proceedings have concluded, a summary application must be lodged in respect of any alleged contempt of court such as by failing to obtemper a contact order.
47. Where the minute is to vary Section 11 orders, the sheriff may issue an interlocutor which provides for answers to be lodged by the respondent and the fixing of a child welfare hearing.
48. A minute to vary is generally not competent where the original action has been dismissed. There are no existing orders which can be varied and the court has not determined that it would be in the interests of the child/ren for no orders to be pronounced. An application for Section 11 orders must be made by initial writ in those circumstances.
49. Where an action of divorce, separation or nullity of marriage has been raised previously and final decree has been granted, a party seeking Section 11 orders or the variation, recall or enforcement of Section 11 orders will require to lodge a minute to vary in the process of the original action even if no Section 11 orders were sought or granted in the original action. Where an action of dissolution or declarator of nullity of civil partnership or separation of civil partners has been raised previously and final decree has been granted, a party seeking Section 11 orders or the variation, recall or enforcement of Section 11 orders will require to lodge a minute to vary in the process of the original action even if no Section 11 orders were sought or granted in the original action. If no Section 11 orders were made when decree was granted then at that time the Sheriff decided that it was in the best interests of the child/ren that no orders be made.
50. After final decree in any of the actions referred to in para 49 above, where a party does not seek to have the other party found in contempt and punished by the court but considers that the other party is not obtempering the court order then he should

consider whether the appropriate minute to be enrolled is a minute to enforce the existing order.

51. In other cases where Section 11 orders have been granted or refused, applications after final decree for variation or recall of a Section 11 order shall be made by minute to vary in the process of the original action.

[OCR 33.38 and OCR 33.44 and OCR 33.60 and OCR 33.65. See also OCR 33A.38 and OCR 33A.41 and OCR 33A.54 and OCR 33A.57. See section 42(3) of the Family Law Act 1986 which states that matrimonial proceedings in Scotland with respect to a child shall be treated as continuing until the child concerned reaches the age of 16 unless the proceedings have been dismissed or decree of absolvitor has been granted therein. See also *McEwen v McEwen* (Sheriff Principal McInnes, QC at Hamilton - 25 August 2000) at http://www.scotcourts.gov.uk/opinions/D270_00.html]

PART XI

Preparations for proof and pre proof hearings

52. When the court allows parties a proof of their respective averments, an interlocutor will be pronounced in such terms but the court will not assign a proof diet until the following procedures have been complied with. The purpose of these procedures is to determine more accurately the number of days which should be allocated to the proof and to ensure that parties have focussed the issues.
53. Where parties intend to lead evidence from expert witnesses they must lodge in process and exchange copies of the reports. In addition there must be a meeting of the experts following which the agents must lodge in process a minute of said meeting recording those issues upon which the experts disagree.
54. Parties must also lodge in process and exchange lists of the witnesses whom they intend to lead in evidence. In addition to the list of witnesses parties must lodge

summaries of the witness statements. The summaries must contain sufficient information to identify the issues which it is anticipated the witnesses will speak to.

55. At pre-proof hearings parties shall ensure that they are in a position to provide the sheriff with sufficient information to enable the sheriff to conduct the hearing as provided for in OCR 28A.1. In particular, parties shall ensure that they can provide the sheriff with sufficient information regarding the matters set out in OCR 28A.1(3).

C.A.L. SCOTT

Sheriff Principal of Glasgow and Strathkelvin

GLASGOW, 30 January 2012